Supreme Court, U.S.
FILED
DEC 10 2014
OFFICE OF THE CLERK

No. 14-103

IN THE
Supreme Court of the United States

BAKER BOTTS L.L.P. AND
JORDAN, HYDEN, WOMBLE, CULBRETH & HOLZER, P.C.,

Petitioners,

v.

ASARCO LLC,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE COMMITTEE ON BANKRUPTCY AND CORPORATE REORGANIZATION OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, THE BUSINESS LAW SECTION OF THE FLORIDA BAR, THE BANKRUPTCY LAW SECTION OF THE LOUISIANA STATE BAR ASSOCIATION, AND THE BANKRUPTCY LAW SECTION OF THE BEVERLY HILLS BAR ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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The Committee on Bankruptcy and Corporate Reorganization of the Association of the Bar of the City of New York, the Business Law Section of The Florida Bar, the Bankruptcy Law Section of the Louisiana State Bar Association, and the Bankruptcy Law Section of the Beverly Hills Bar Association respectfully submit this brief as *amici curiae* in support of petitioners.[1]

INTEREST OF *AMICI CURIAE*

The Association of the Bar of the City of New York, founded in 1870, is a voluntary association of more than 23,000 lawyers and law students. Its purposes include cultivating the science of jurisprudence, promoting reforms in the law, facilitating and improving the administration of justice, and elevating the standard of integrity, honor, and courtesy in the legal profession. The Association has 150 committees that focus on different legal practice areas and issues. Among these is the Committee on Bankruptcy and Corporate Reorganization, which focuses on issues relevant to corporate and individual bankruptcies and corporate restructurings. Committee members include lawyers who represent both debtors and creditors in corporate and individual bankruptcies,

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[1] Pursuant to this Court's Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amici*, their members, or counsel made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to this Court's Rule 37.3, the parties in this case have consented to the filing of this brief. Petitioners filed a blanket consent to the filing of all *amicus curiae* briefs on October 8, 2014, and respondent's consent letter is filed along with this brief.

as well as scholars and financial advisors. Among other functions, the Committee engages on issues relevant to the development of bankruptcy law through judicial decisions and legislation. This brief was approved by the Committee and by the President of the New York City Bar Association.

The Business Law Section of The Florida Bar is a voluntary organization within The Florida Bar for members interested in corporate law, banking, business, bankruptcy, computer and cyber law, antitrust and franchise law, litigation, and related areas of law. Its purpose is to provide a forum for the discussion and exchange of ideas leading to the improvement of the laws relating to these areas. The Business Law Section has filed *amicus* briefs with this Court, the United States Courts of Appeals, and the Florida Supreme Court in cases involving bankruptcy-related issues. The Business Law Section also actively participates in legislative initiatives contemplating amendments to the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, and applicable Florida statutes. The Business Law Section thus has a strong interest in the proper interpretation and administration of the Bankruptcy Code.[2]

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[2] This brief was reviewed by the Executive Committee of the Board of Governors of The Florida Bar on December 8, 2014, consistent with applicable standing board policies. It is tendered solely by the Business Law Section and supported by the separate resources of this voluntary organization—not in the name of The Florida Bar, and without implicating the mandatory membership fees paid by any Florida Bar licensee.

The Bankruptcy Law Section of the Louisiana State Bar Association ("LSBA") is a voluntary section of lawyers who practice in this field. The Section seeks to encourage and foster (1) discussions and studies and the dissemination of information relating to bankruptcy law; (2) continuing education relating to developments in this field; (3) the study of possible improvements in this field; (4) interest, activity, and research in this field; and (5) cooperation with relevant Sections of the American Bar Association. In particular, the Bankruptcy Law Section of the LSBA has a strong interest in making sure that the Bankruptcy Code is properly and consistently interpreted.[3]

The Beverly Hills Bar Association (BHBA) is a voluntary bar association with more than 5,600 members who live or work on the west side of Los Angeles County, California. BHBA is dedicated to improving the administration of justice, meeting the professional needs of Los Angeles lawyers, and serving the public. BHBA is located within the Central District of California, which has the largest volume of bankruptcy cases in the country.

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[3] This position is being presented only on behalf of the Bankruptcy Law Section of the LSBA. This position should not be construed as representing the position of the Board of Governors, the Executive Committee, or the General Membership of the LSBA. The Bankruptcy Law Section which takes this position is a voluntary section of 159 members composed of lawyers practicing in a specified area of law. This position is taken as the result of a vote of 3 to 0 of the Executive Committee of the Bankruptcy Law Section, which is the governing body of that section. No approval or disapproval of the General Membership of the Section has been obtained.

Accordingly, BHBA has an active Bankruptcy Law Section whose members include a broad range of bankruptcy practitioners, including attorneys, judges, scholars, and advisors representing debtors, creditors, trustees, committees and other parties in interest in bankruptcy cases large and small. The Section serves as an educational resource for practitioners and as an advocate for their causes. Its members are interested in the interpretation of the Bankruptcy Code and, as practitioners in the Ninth Circuit, are particularly interested in upholding *In re Smith*, 317 F.3d 918 (9th Cir. 2002), which properly places the award of fees for the defense of fee applications within the bankruptcy court's sound discretion.

INTRODUCTION AND SUMMARY OF ARGUMENT

In the decision below, the Fifth Circuit announced a bright-line rule that the Bankruptcy Code gives judges *no* discretion to award professional fees incurred in the defense of an application for professional fees. According to the Fifth Circuit, such fees are never "necessary" to the administration of a bankruptcy case because "[t]he primary beneficiary of a professional fee application, of course, is the professional." Pet. App. 15a. But the relevant statute, 11 U.S.C. § 330, plainly recognizes that providing appropriate compensation for covered professionals furthers the fair and equitable resolution of a bankruptcy case, which is why the statute authorizes appropriate compensation for covered professionals in the first place.

The term "necessary" in the relevant Bankruptcy Code provisions, thus, is not amenable to a bright-line interpretation that categorically includes or

excludes fees incurred in defense of a professional fee application. Whether such fees are warranted in any particular case is a question assigned in the first instance to the bankruptcy court, and thereafter subject to review for abuse of discretion.

The Fifth Circuit's contrary rule categorically deeming fees for the defense of a fee application "unnecessary" to the administration of a bankruptcy case creates a perverse incentive for abuse. It is hard to imagine a court ever awarding such fees insofar as a challenge to a fee application has succeeded. Therefore, almost by definition, the question is whether a bankruptcy court can award such fees insofar as a challenge to a fee application has failed. If courts lack such power, there is nothing to prevent interested (and often adverse) parties from forcing professionals to incur substantial fees to defend against meritless challenges to a fee application, and thereby to dilute their fees. While the statute does not *require* bankruptcy courts to award fees incurred in defending fee applications, it certainly *allows* bankruptcy courts to award such fees as warranted in particular cases.

The bankruptcy process is a unique hybrid of litigation and negotiation. Parties bring claims against each other, but also try to resolve their differences consensually. The Bankruptcy Code relies upon the adversarial process to reconcile the parties' conflicting interests, which is why the Bankruptcy Code authorizes compensation from the estate not only for the debtor's counsel, but also for counsel for official committees of creditors (as well as other professionals). Sometimes, as this case illustrates, the adversarial process can result in

animosity. The Fifth Circuit's atextual bright-line rule allows adverse parties to use the explicit or implicit threat of a challenge to a professional fee application to distort the process. In particular, that rule makes it easier for interested parties to mount strategic challenges to professional fees in an attempt to drive a wedge between the interests of professionals and their clients, or to discourage professionals from representing their clients in the first place. To avoid such abuse, it was eminently sensible for Congress to vest bankruptcy courts with discretion to award fees for the defense of fee applications in appropriate circumstances. Because the decision below strips the courts of such discretion, this Court should reverse the judgment.

ARGUMENT

The Bankruptcy Code Gives Bankruptcy Courts Discretion To Award Professional Fees Incurred In The Defense Of A Fee Application.

The Bankruptcy Code specifically authorizes bankruptcy courts to award professionals (including attorneys) "reasonable compensation for actual, *necessary* services rendered" from the assets of the estate. 11 U.S.C. § 330(a)(1) (emphasis added). That authorization extends to professionals "employed under section 327 or 1103," *id.*—*i.e.*, not merely professionals who serve the debtor or trustee (section 327), but also professionals who serve official creditors' committees (section 1103).

The key textual question, then, involves the meaning of the word "necessary." The Fifth Circuit held that professional fees incurred in defense of an application for professional fees can *never* be deemed "necessary" to the administration of a case, based on

the theory that such fees categorically do not benefit "the debtor's estate or its administration" because "the debtor's estate, and therefore normally the creditors, bear the cost." Pet. App. 15a. That theory reflects a misunderstanding of statutory text and structure as well as the bankruptcy process, with grave consequences for the clients represented by professionals in bankruptcy cases.

The term "necessary," here as elsewhere in the law, does not mean absolutely or metaphysically essential. *Cf. United States v. Comstock*, 560 U.S. 126, 133-34 (2010) (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 413-15 (1819)); *Cellular Telecomms. & Internet Ass'n v. FCC*, 330 F.3d 502, 510 (D.C. Cir. 2003). Indeed, the statute underscores this point by specifically authorizing compensation for professional services that were "beneficial" to the completion of a bankruptcy case, 11 U.S.C. § 330(a)(3)(C), including compensation for the preparation of a professional fee application, *see id.* § 330(a)(6).

Congress thus clearly understood that reasonable compensation for professionals is "necessary" to the fair and equitable resolution of a bankruptcy case, even though (as the Fifth Circuit pointed out) "the debtor's estate, and therefore normally the creditors, bear the cost" of such compensation. Pet. App. 15a. The fact that an award of fees benefits the professional does not mean that it does not *also* benefit the professional's client or the bankruptcy process as a whole. *See, e.g., In re Worldwide Direct, Inc.*, 334 B.R. 108, 111 (D. Del. 2005). Indeed, as noted above, the statute necessarily recognizes that professionals promote the fair and equitable resolution of bankruptcy cases because the statute

allows such professionals to be reasonably compensated from the bankruptcy estate's assets in the first place. The statute does not exclude any substantive category of fees (such as fees incurred in the preparation or defense of a fee application). Rather, the statute excludes *only* compensation for "unnecessary duplication of services," services that were not "reasonably likely to benefit the debtor's estate," and services that were not "necessary to the administration of the case." 11 U.S.C. § 330(a)(4)(A).

There is simply no basis in the statute for the Fifth Circuit's bright-line rule that a bankruptcy court may never award compensation for fees incurred in the defense of a fee application. Indeed, such fees are materially indistinguishable from "compensation awarded for the preparation of a fee application," which the statute expressly contemplates. 11 U.S.C. § 330(a)(6). Contrary to the Fifth Circuit's suggestion, *see* Pet. App. 15-16a, the fact that the statute addresses the latter does not mean that it does not encompass the former. Subsection (a)(6) does not purport to *authorize* compensation for the preparation of a fee application; rather, it simply specifies that such compensation "shall be based on the level and skill reasonably required to prepare the application." 11 U.S.C. § 330(a)(6). Such compensation, like all other professional compensation, is authorized by subsection (a)(1), which, as noted above, refers only to "reasonable compensation for actual, necessary services rendered" by a professional. Compensation for the *defense* of a fee application, like compensation for the *preparation* of a fee application, readily falls within that authorization because it promotes the fair and equitable resolution of a bankruptcy case.

Such compensation encourages competent professionals to represent debtors and official committees, and prevents their fees from dilution as a result of the unusually transparent and deliberately cumbersome fee application process. *See, e.g.*, *Smith*, 317 F.3d at 928.

A modern bankruptcy fee application, after all, is the antithesis of the old-school one-line legal bill "for services rendered." This is not a private matter between an attorney and a client, but rather a public document subject not only to court approval but also to challenge by a range of interested—and potentially adverse—parties. *See* 11 U.S.C. § 330(a)(1) (requiring notice of the application to the United States Trustee and other interested parties). As the Fifth Circuit noted, "bankruptcy rules require professionals to justify their fee applications with detailed, itemized billing records." Pet. App. 17a (citing, *inter alia*, Fed. R. Bankr. P. 2016). Bankruptcy courts across the country have established different, but equally rigorous, guidelines governing fee applications. *See, e.g.*, Southern District of Texas Guidelines for Compensation & Expense Reimbursement of Professionals in Complex Chapter 11 Cases, *available at* http://www.txs.uscourts.gov/bankruptcy/rulesformsproc/tx_ch11_comp_rules.pdf (last visited Dec. 9, 2014). In addition, the various regional offices of the United States Trustee have established detailed operating and reporting requirements. *See, e.g.*, Chapter 11 Operating Guidelines & Reporting Requirements of the U.S. Trustee, Region 5, Judicial Districts of Louisiana and Mississippi, *available at* http://www.justice.gov/ust/r05/docs/general/guidelines/ogrr11.pdf (last visited Dec. 9, 2014). For better or

worse, "[p]reparing and defending attorney fee applications is part and parcel with the attorney's role in the administration of the bankruptcy process." *Boyd v. Engman*, 404 B.R. 467, 483 (W.D. Mich. 2009).

The grounds for objecting to a professional fee application, if an interested party is inclined to do so, are virtually limitless. The handling of a case, after all, entails a series of substantive judgment calls. Was it necessary to send two attorneys, instead of one, to cover a hearing? Was it necessary to spend five hours, instead of one or two, researching a particular State's fraudulent transfer law? Was it necessary to look into a particular legal theory that ultimately did not make its way into the pleadings? Pet. App. 121-23a. Could a task performed by a senior associate have been performed by a junior associate? Pet. App. 130a. There is no "right" or "wrong" answer to any of these questions; they all involve the exercise of sound professional judgment, which is inherently subject to second-guessing.

Similarly, the mechanics of professional billing are subject to a virtually limitless array of challenges. Courts typically recognize, as did the bankruptcy court below, that they must not "impose slavish and over burdensome record-keeping requirements which, in the final analysis, result in fee applications of such enormous length and detail that they are of little ultimate value to the Court in awarding fees." Pet. App. 108-09a (internal quotation omitted). But how much detail is too much? The answer to that question is often in the eye of the beholder. And that is merely one of many potential questions involving the mechanics of billing. As this case shows, other potential questions

include the extent—if any—to which a bill should be reduced to account for attorney turnover, and whether it is appropriate to bill for the time of summer associates. *See* Pet. App. 112-14a, 130a. Again, all of these matters are inherently subject to second-guessing.

If an interested party wants to challenge a fee application, in other words, there will be no shortage of grounds on which to do so. And, as this case underscores, such challenges—even if ultimately deemed meritless—can force the professional to devote considerable resources to the defense of the application, thereby diluting the professional's fees. Such dilution may be perfectly appropriate if the requested fees are unwarranted, but the possibility of such dilution may also lead to abuse.

In our adversarial system, it is anomalous to give an adverse party the opportunity to review and challenge a professional's fees. Outside the context of the bankruptcy statute and a limited number of fee-shifting statutes, *see, e.g.*, 17 U.S.C. § 505; 35 U.S.C. § 285; 42 U.S.C. § 1988; 42 U.S.C. § 2000e-5(k), an attorney's fees are generally not subject to an opposing party's review and challenge, and one can only imagine the disputes that would ensue if they were. And this anomalous regime creates opportunities for abuse. At the very least, the fee application process gives adverse parties a weapon to try to drive a wedge between the interests of professionals and those of their clients, or to discourage professionals from representing their clients in the first place. Counsel for the debtor or an official committee must often take aggressive action to marshal the estate's assets—for example (as this case illustrates), filing a fraudulent transfer claim

against a major creditor. *See* Pet. App. 3a. Needless to say, such aggressive action is generally unwelcome to its targets, and it is neither unexpected nor unknown for them to respond by challenging professional fees, or threatening—implicitly or explicitly—to do so. Giving bankruptcy courts discretion to award fees for the defense of fee applications in appropriate circumstances ensures that the prospect of challenges to fee applications will not distort the adversarial process, and thus provides a valuable check on the exceptional power of interested parties in bankruptcy to review and challenge the fees of professionals representing other parties.

The Fifth Circuit sought to address this concern by declaring that "[w]e are confident that bankruptcy courts, practicing vigilance and sound case management, can thwart punitive or excessively costly attacks on professional fee applications." Pet. App. 21a. Such "confiden[ce]," however, is misplaced. The "vigilance and sound case management" invoked by the Fifth Circuit boils down to a court's authority to sanction litigants for "bad faith" conduct. *Id.* (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46 (1991)). But establishing "bad faith" is never an easy task, and is especially difficult in this context, given that there is nothing inherently wrong with raising a multiplicity of objections to a professional fee application. Even where such objections are meritless, that hardly means that they are sanctionable. *See, e.g.*, *Mennella v. Kurt E. Schon E.A.I., Ltd.*, 979 F.2d 357, 365 (5th Cir. 1992) (distinguishing between "meritless" and "sanctionable" positions).

Nor is it any answer to assert, as did the Fifth Circuit, that professionals can address the threat of fee dilution by "anticipat[ing] this possibility in their hourly rates." Pet. App. 18a n.7. Hourly rates in bankruptcy cases are typically established at the outset of a representation, and there is simply no way to factor in the expense of a subsequent defense against challenges to fee applications as a "cost of doing business." And hourly rates in bankruptcy are typically set by reference to the rates of non-bankruptcy practitioners, which do not include any comparable component to reflect the defense of a fee application. *See, e.g.*, 11 U.S.C. § 330(a)(3)(F) (court reviewing professional fee application must consider "whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than under this title"). Indeed, the United States Trustee has promulgated fee guidelines that require disclosure of a professional's comparable rates in non-bankruptcy engagements, and verification that the client has sought to ensure that the billing rates are comparable to non-bankruptcy engagements. *See* Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses Filed Under 11 U.S.C. 330 by Attorneys in Larger Chapter 11 Cases, 78 Fed. Reg. 36248 (June 17, 2013). It would be an odd system indeed that allowed professionals to be compensated for defending fee applications indirectly through their hourly rates instead of directly through compensation for reasonable actual defense fees.

The decision below thus gets matters precisely backwards when it asserts that "[t]he perverse incentives that could arise from paying the

bankruptcy professionals to engage in satellite fee litigation are easy to conceive." Pet. App. 18a. Allowing professionals to recover fees incurred in defense of fee applications creates no incentive "to engage in satellite fee litigation" because professionals have no assurance that they will be awarded such fees (and indeed are highly unlikely to be awarded such fees insofar as the challenges to the fee application are meritorious). *See, e.g.*, *In re Riverside-Linden Inv. Co.*, 945 F.2d 320, 323 (9th Cir. 1991). Rather, the only perverse incentives here are created by the Fifth Circuit's rule that fees incurred in defense of fee applications are *never* compensable, a blanket rule that raises the prospect that adversaries will—implicitly or explicitly—use the threat of fee litigation to distort the adversarial process.

The Fifth Circuit's decision also undermines the touchstone of parity between professional fees in bankruptcy cases and non-bankruptcy cases. In overhauling the Bankruptcy Code in 1978, Congress specifically abandoned the prior "economy of the estate" rule in favor of parity in compensation between bankruptcy and non-bankruptcy practitioners to ensure that debtors had access to skilled counsel. *See, e.g.*, *In re Babcock & Wilcox Co.*, 526 F.3d 824, 827 (5th Cir. 2008) (*per curiam*) ("Prior to being amended in 1978, this statute favored economy of the estate over competitive compensation to attorneys for the debtors.") (internal quotation omitted); 3 *Collier on Bankruptcy* ¶ 330.03[3] (16th ed. 2014) ("The economy factor was abandoned under the Bankruptcy Code in favor of the new policy that attorneys engaged in bankruptcy cases should receive compensation in parity with that received by

attorneys performing services in comparable situations."). The decision below threatens an effective reduction in rates of retained professionals in proportion to their efforts in defending their fees. And such dilution can be a particular concern in smaller cases: the more modest the underlying fees requested in the application, the more likely the defense against an abusive challenge to render the entire representation uneconomical. Parity promotes the adversarial process in bankruptcy cases, and that process in turn promotes the overall efficiency and fairness of the bankruptcy system.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment.

December 10, 2014

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